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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ENGINEERS AND SCIENTISTS OF CALIFORNIA, LOCAL 20, IFPTE, AFL-CIO & CLC **Petitioner,** **and** **PACIFIC GAS & ELECTRIC CO.** **Respondent**	CASE NO. 20-RC-140248

BRIEF IN OPPOSITION TO PETITIONER'S EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS ON OBJECTIONS AND NOTICE OF HEARING

Respondent Pacific Gas & Electric Co. ("PG&E" or the "Company") hereby files its brief in opposition to Petitioner Engineers and Scientists of California, Local 20, International Federation of Professional and Technical Engineers, AFL-CIO & CLC's ("ESC" or the "Union") exceptions to the Regional Director's report and recommendations on objections and notice of hearing in the above-captioned matter. For the reasons that follow, PG&E respectfully submits that the Board should accept the Regional Director's recommendations and should continue to overrule ESC's Objections 2, 3, 12, and 13.

INTRODUCTION

Regional Director Joseph Frankl properly recommended that each of the election objections subject to the ESC's exceptions be overruled. As discussed more fully below, the ESC has failed to present any legal argument or factual evidence to support its positions and various assertions that raise any substantial and material issues of fact or law necessitating a hearing.

First, ESC's Objection 2—alleging that PG&E violated the Board's *Peerless Plywood* doctrine by sending a December 9, 2014 *email*—is meritless as it is well-settled that the *Peerless* doctrine applies only to speeches and other verbal means of communication, and not to written campaign literature like the December 9 email. ESC does not, and cannot, cite a single case in which the *Peerless* rule has been applied under similar circumstances.

Second, ESC's Objection 3—asserting that by the same December 9 email, PG&E made it appear that the Board consented to PG&E's campaign literature and/or gave employees the impression that the Company, and not the Board, controlled the election process—is groundless since there is no evidence to suggest that the Board endorsed the contents of the email or delegated to PG&E any authority over the conduct of the election.

Third, ESC's Objection 12—alleging that employees could reasonably construe the December 9 email as a threat on the part of the Company to unilaterally reduce the employees' wages and/or benefits in the event the Union won the election—is completely at odds with the plain language of the email, with its repeated references to the Company's commitment to bargain in "good faith."

Finally, ESC did not present any evidence to substantiate its assertion in Objection 13 that PG&E or one of its managers or agents disseminated the complaint of a bargaining unit employee, and that such alleged dissemination interfered with the laboratory conditions.

Therefore, the Board should accept the Regional Director's recommendation to overrule these Objections without the need for a hearing.

BACKGROUND

On November 11, 2014, ESC filed its election Petition seeking to represent Gas Operations Contract Specialists and technical employees in PG&E's Contract Management Department. In accordance with a Stipulated Election Agreement, approved by the Regional Director on November 14, 2012 (the "Agreement"), a Board agent conducted an election by secret manual ballot on December 10, 2014 at PG&E's San Ramon, California office. After resolution of a challenge to one of the ballots, the final tally showed that 13 employees voted in favor of representation by ESC and 13 employees voted against representation.

ESC filed Objections to the election on December 17, 2014. On May 11, 2015, the Regional Director issued a Report on Objections, Order Directing, and Notice of Hearing (the "Report"). In his Report, the Regional Director granted ESC's request to withdraw five of its Objections, recommended that the Board overrule four of ESC's Objections "as they do not raise substantial or material issues of fact or law that would require a hearing," and found that a hearing was required on the remaining Objections. Report at 4. Subsequently, on May 26, 2015, ESC filed exceptions to the Regional Director's Report, challenging the Regional Director's recommendation that Objections 2, 3, 12, and 13 be overruled.

ARGUMENT

I. THE REGIONAL DIRECTOR PROPERLY OVERRULED ESC'S SECOND OBJECTION SINCE THE *PEERLESS PLYWOOD* RULE DOES NOT APPLY TO CAMPAIGN LITERATURE.

PG&E was in full compliance with the Board's *Peerless Plywood* prohibition against "captive audience" speeches within 24 hours of the election. The ESC's assertion that an email sent on December 9 violated the rule is meritless as it is well-settled that the *Peerless* doctrine applies only to speeches and other verbal means of communication and not to written campaign literature like the email.

The rule set forth in *Peerless* prohibits "employers and unions alike ... from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood Co.*, 107 NLRB 427, 429 (1953). The Board promulgated this rule specifically to address what it saw as the evils of last-minute speeches and other verbal forms of communication. The Board was concerned that speeches, unlike other modes of communication, have a unique tendency to influence employees and undermine their free will. *Id.* ("Such a *speech*, because of its timing, tends to create a mass psychology which overrides arguments made through *other campaign media* and gives an unfair advantage to the party, whether employer or union, who *in this manner* obtains the last most telling word.") (emphasis added). The particular mode of communication used—speech—was thus central to the Board's decision. Indeed, the Board explicitly excluded the circulation of written "campaign literature ... [and] any other legitimate campaign propaganda or media" from the scope of its captive audience rule. *Id.* at 430; *see also, e.g., In Re Pearson Educ., Inc.*, 336 NLRB 979, 979 (2001) (overturning decision of administrative law judge and holding that "[t]he *Peerless Plywood* rule ... does not apply to posters or other campaign literature."); *In Re*

Virginia Concrete Corp., Inc., 338 NLRB 1182, 1187 (2003) ("In *Peerless*, the Board clarified that its rule prohibiting captive audience speeches did not prohibit circulating campaign literature or 'any other legitimate campaign propaganda or media.'") (quoting *Peerless*, 107 NLRB at 430).

The *Peerless* captive audience doctrine clearly does not apply to the December 9 email. The email is campaign literature, plain and simple, which PG&E had every right to distribute in the run up to the election. In his Report, the Regional Director aptly recognized that the policy considerations underlying the *Peerless* rule are not present in the case of an email: "Put simply, the employees who received the Employer's e-mail were not in massed assemblies and they were not compelled to read, or hear, the content of the e-mail." Report at 8. *Peerless's* concerns about employees being forced against their will to listen to a speech in a captive environment on the eve of an election plainly are not present when an employee receives a mere email, since he/she can simply avert his/her eyes or easily delete it with the click of a button. There is nothing "captive" or "involuntary" about it.

In a case with very similar facts to here, *In Re Virginia Concrete Corp., Inc.*, 338 NLRB 1182, the Board considered whether an electronic communication to employees could be considered a "speech" under *Peerless*, and concluded that it could not. *Id.* at 1187. In that case, the union alleged that the employer interfered with the election by disseminating to employees' mobile data units an electronic text message urging them to "Vote No" less than 24 hours before the election. *Id.* The administrative law judge initially held that the employer's message violated the *Peerless* doctrine because it was uninvited. *Id.* The judge found that the employees were a captive audience since although the employees could readily delete the message or scroll past it, in doing so they would see it. *Id.*

Reversing the judge, the Board found that the electronic message did not run afoul of the *Peerless* rule because it was more analogous to campaign literature than to a campaign speech or similar verbal communication. *Id.* The Board emphasized that "[t]he message was *not audible* … [and] [a]lthough it was uninvited, the [employees] *could delete or scroll past it if they chose*; they did not have to leave it on the screen indefinitely." *Id.* (emphasis added). The Board explicitly rejected the union's argument that the employees were a captive audience since they could not delete or scroll past the message without at least glancing at it, stating that "[w]e do not find it persuasive that employees would necessarily be exposed to the message in the process of deleting or scrolling past it. The same can be said of campaign posters, to which *Peerless* does not apply." *Id.*

As in *Virginia Concrete*, the December 9 campaign email "was *not audible* … [and] the [employees] *could delete or scroll past it if they chose*; they did not have to leave it on the screen indefinitely." *Id.* (emphasis added). Just like the electronic message in *Virginia Concrete*, the email shares none of the characteristics of a "captive audience speech," and is much more akin to the distribution of campaign literature. *See id.*

The fact that the location of the election was contained in this email is entirely irrelevant. Indeed, ESC's argument that the employees were "forced" to read through the entire message before deleting it or scrolling past the campaign portion, and thereby were magically transformed into a "captive audience," is the very same argument that was flatly rejected by the Board in *Virginia Concrete*. *See* 338 NLRB at 1187. An employee sitting at his/her computer scrolling through emails cannot be considered a member of a "captive audience" in any true sense of the term.[1]

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[1] ESC's argument that the eligible voters were not aware of the location of the vote until the December 9 email is much ado about nothing, and is a poorly-veiled attempt to distract the Board from the fact that ESC does not

Moreover, ESC fails to cite even a single case in which the Board found that the *Peerless* doctrine applied to a campaign email or any other form of written or electronic campaign propaganda. The two cases ESC cites in its brief provide no support for its novel captive audience argument, and simply reinforce the point that the *Peerless* rule applies only to speeches and similar verbal forms of communication. *See Montgomery Ward & Co.*, 124 NLRB 343, 344 (1959) (holding that *Peerless* captive audience rule applied to question-and-answer session); *United States Gypsum Co. (New Brighton, N. Y.)*, 115 NLRB 734, 735 (1956) (setting aside election based on *Peerless* rule where union sound truck broadcasted campaign speeches to employees). In fact, ESC itself acknowledges the weakness of its argument when it admits in its brief that "the December 9 email from Ms. Winnie was not a captive audience speech in the traditional sense[.]" ESC's Br. at 6; *see also id.* at 8 (again acknowledging that this situation "does not fit neatly within the *Peerless Plywood* rule"). Since it is well-established that the *Peerless* captive audience rule applies only to speeches and similar verbal communications and not to campaign literature, and ESC has not presented any authority to suggest otherwise, the Board should affirm the Regional Director's decision to overrule Objection 2 without a hearing.

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have any support for its argument that the voters were forced to listen to a captive audience speech under the meaning of *Peerless*, as discussed at length above. Moreover, although the employees may not have been aware of the specific room within the facility where the election would occur prior to receiving the email, the parties' Agreement and the Board's Notice of Election designated PG&E's street address as the location where balloting would take place. In addition, ESC never expressed a preference for another polling room, and did not inform the voting unit that PG&E had improperly selected the polling room without advance agreement of ESC or designation by the Board. As such, the December 9 email clearly did not have a reasonable tendency to interfere with the requisite laboratory conditions.

II. THE REGIONAL DIRECTOR APPROPRIATELY OVERRULED ESC'S THIRD OBJECTION BECAUSE NOTHING IN THE DECEMBER 9 EMAIL GAVE THE APPEARANCE THAT PG&E, AND NOT THE BOARD, CONTROLLED THE ELECTION PROCESS.

Contrary to ESC's Objection 3, the December 9 email neither (1) made it appear that the Board consented to PG&E's campaign literature, nor (2) gave employees the impression that the Company, and not the Board, controlled the election process. Since there is nothing in the email suggesting that the Board endorsed the contents of the email, and ESC has not come forward with anything to substantiate its assertion that the Board delegated to PG&E the task of notifying employees of the polling location (which, in any event, would not be grounds to set aside the election), the Regional Director correctly found that this Objection was meritless and did not warrant a hearing.

An election will only be set aside when a party distributes a document that gives the voting unit the misleading impression that the Board favors one of the parties over the other. *C.J. Krehbiel Co.*, 279 NLRB 855, 855 (1986). "[H]owever, … 'when the party responsible for preparation of the [document] is clearly identified on the face of the material itself, employees would know that the document emanated from [that] party, not the Board, and thus would not be led to believe that the party has been endorsed by the Board.'" *Id.* (quoting *SDC Investments,* 274 NLRB 556, 557 (1985)). Thus, such a document "has [no] tendency to mislead employees into believing the Board favors one party's cause." *C.J. Krehbiel Co.*, 279 NLRB at 855-56 (holding union did not engage in objectionable conduct by distributing fliers quoting caption and remedy section of Administrative Law Judge decision embellished with cartoons and slogans readily identifiable as "partisan campaign comments" of union and not endorsement of union by Board, and second flier explicitly stated that earlier flier "came from office of the Union").

Here, the Regional Director properly concluded that "there is nothing in the e-mail, or elsewhere for that matter, suggesting that the Board coauthored or endorsed the contents of the e-mail." Report at 8. In fact, the only time the email mentions the Board is as a reminder to the voting unit that the Board, and not the Company, would be conducting the election. *See id.* at 5 ("On Wednesday the National Labor Relations Board is scheduled to conduct an election wherein you will decide whether you wish to elect the ESC as your exclusive collective bargaining representative."); *id.* ("As a reminder, the election will be conducted by secret ballot by the National Labor Relations Board.").

As the Regional Director noted, ESC does not allege, and there is no evidence to suggest, that the Company conveyed to the voting unit in any other manner that the Board endorsed its campaign message or otherwise favored the Company in the election. *Id.* at 8. Indeed, at the very beginning of the email, PG&E's Human Resources Director, Terri Winnie, clearly identified herself as the author/sender of the email. *Id.* at 5. Therefore, the email "has [no] tendency to mislead employees into believing the Board favors [PG&E's] cause." *C.J. Krehbiel Co.*, 279 NLRB at 855.

With regard to ESC's allegation that the December 9 email gave employees the impression that the Company, and not the Board, controlled the election process, and that the Board delegated to the Company the authority to do so, ESC has failed to proffer any evidence or legal authority to support such a theory. Indeed, this assertion is belied by the email's explicit references to the Board conducting the election. *See* Report at 5.

ESC's reliance on *North of Market Senior Services, Inc. v. NLRB*, 204 F.3d 1163 (D.C. Cir. 2000), is entirely misplaced. In that case, on the day of the election, a Board official delegated to two union agents the task of notifying employees of the time of the vote. *Id.* at

1166. The union agents then proceeded to "rampage through [the employer's] facility[,]" and "barge[] into [patient] exam rooms unannounced and without permission from [the employer]" in order to deliver the message, all the while declaring that they were "authorized" to speak on behalf of the Board. *Id.* at 1167, 1169. The court held that by granting the union agents this authority, the Board official had impermissibly "delegate[ed] nonminor official election duties to a party." *Id.* at 1168. As a result of the union agents' egregious conduct, the court concluded that "the Board agent's delegation raised a serious threat to the integrity of the election, because it resulted in Union agents tromping through the employer's facility, on the direct authority of an official from the NLRB, during the precious moments before the polls opened." *Id.* Importantly, however, the court acknowledged that "[t]here is no doubt that simply delegating the task of telling employees when to vote does not impugn the integrity of an election." *Id.* (citing *San Francisco Sausage Co., Inc.*, 291 NLRB 384, 384 n.1 (1988)). The court explained that what made this objectionable under the circumstances was the union agents' extreme conduct after being given this authority. *Id.* at 1168-69.

North of Market Senior Services is easily distinguishable from the present situation on several grounds. First, unlike in *North of Market Senior Services*, where the Board official expressly delegated to the union agents authority over the election process, the Board did not delegate to PG&E any election task, let alone an "important part of the election process." *Alco Iron & Metal Co.*, 269 NLRB 590, 592 (1984). Additionally, in *North of Market Senior Services*, the union agents repeatedly represented to the employees that they were "authorized" to speak on behalf of the Board. 204 F.3d at 1169. Here, by contrast, there were no words or acts on the part of PG&E, whether in the December 9 email or otherwise, that would have given employees the impression that the Board had ceded authority to the Company over the conduct

of the election. Finally, "rampaging" and "tromping" through a building to get the message across is a far cry from sending a simple email message that could be easily ignored by the employees.

ESC's argument that the Board delegated to PG&E the task of notifying employees of the location of the vote "by omission" should also be rejected, as ESC does not cite any authority in support of this novel theory. Even assuming *arguendo* that the Board had delegated to PG&E the authority to inform the voting unit of the location of the election, which it clearly did not, this "amounts to nothing more than delegating [an] inconsequential task[], which is insufficient to destroy the Board's appearance of neutrality." *Kirsch Drapery Hardware*, 299 NLRB 363, 363 (1990). Since "[t]here is no doubt that simply delegating the task of telling employees *when* to vote does not impugn the integrity of an election[,]" *North of Market Senior Services*, 204 F.3d at 1169 (emphasis added), the same holds true for informing employees of *where* to vote. *See also San Francisco Sausage Co., Inc.*, 291 NLRB at 384 n.1 (finding that Board agent's delegation of task of announcing when employees could vote was not objectionable). As the Regional Director aptly put it, "a party's mere announcement of the location of balloting is an election task too inconsequential to create the appearance that the Board relinquished control of 'running the election.'" Report at 10.

In sum, ESC has failed to proffer any facts or law in support of its bare assertions and novel arguments. Therefore, ESC plainly has failed to satisfy its burden to raise a substantial and material issue of fact or law that would necessitate a hearing.

III. THE REGIONAL DIRECTOR PROPERLY OVERRULED ESC'S TWELFTH OBJECTION BECAUSE PG&E DID NOT THREATEN TO REDUCE WAGES AND/OR BENEFITS UNILATERALLY IF THE UNION WON THE ELECTION.

At no time did PG&E make any threat that it would unilaterally modify employees' terms and conditions of employment in the event that the Union won the election. ESC's Objection 12 is based on a strained interpretation of only a few small portions of the December 9 email, while ignoring the repeated references to the Company's commitment to bargain in "good faith" with the Union as part of a "give-and-take" bargaining process. As such, the Regional Director correctly determined that "the December 9 e-mail would not reasonably lead employees to conclude that [PG&E] would unilaterally decrease their wages and benefits if the [Union] prevailed in the election[.]" Report at 13

It is well-established that Section 8(c) of the National Labor Relations Act (the "Act") protects the furnishing of factual information concerning the union organizing process and the probable results if the union were to prevail in the election process. *See, e.g., Exxel/Atmos, Inc. v. NLRB*, 147 F.3d 972, 975 (D.C. Cir. 1998) ("'It is clear that, under Section 8(c), an employer may lawfully furnish accurate information ... if it does so without making threats or promises of benefits'") (quoting *Lee Lumber & Bldg. Material Corp.,* 306 NLRB 408, 409-10 (1992)); *In Re Curwood, Inc.,* 339 NLRB 1137, 1138 (2003) (letter to employees warning them that unionization would be viewed negatively by employer's customers were not unlawful threats but merely conveyed customer concerns). In addition, "'[o]therwise lawful statements do not become unlawful ... merely because they have the effect (intended or otherwise) of causing employees to abandon their support for a union.'" *Exxel/Atmos*, 147 F.3d at 975 (quoting *Lee Lumber*, 306 NLRB at 409-10).

The ESC somehow misconstrues the Company's December 9 email as a threat to "bargain from scratch" or from "ground zero," despite clear statements that the Company recognized its obligation to bargain in good-faith, that it cannot predetermine the result of negotiations, and that it would not take any negative action against any employee as a result of the union vote:

> It has come to our attention that some employees have expressed concerns about possible retaliation or promise of benefit for voting in the upcoming union representation election. I want to assure you that no one's employment status with the Company will be impacted, positively or negatively, because of a vote for or against representation.
>
> * * *
>
> Since the company and the Union are obligated to bargain in "good-faith," but are not obligated to accept a particular proposal, it is impossible to say what the results of bargaining will actually be.

Report at 5. Such explicit assurance clearly prevents any effort to create a threat where none existed. *See Exxel/Atmos*, 147 F.3d at 976; *Int'l Paper Co.*, 273 NLRB 615, 616 (1984).

Despite these assurances, the ESC takes three truthful, non-threatening statements of law and fact and attempts to manufacture an improper threat. Taken individually or collectively, they do no such thing.

First, it is well-settled that an employer may explain that there are "no guarantees" in the context of good-faith collective bargaining negotiations. *See Kawasaki Motors Mfg. Corp.*, 280 NLRB 491, 493 (1986) (employer's statement concerning possible reductions in wages and benefits made "as part of a[] ... discussion of the give and take of collective bargaining" is protected by Section 8(c)); *La-Z-Boy,* 281 NLRB 338, 340 (1986) (statements that apprise employees of "the realities of negotiations ... [and] the give-and-take of bargaining" are lawful); *Ludwig Motor Corp.*, 222 NLRB 635, 635 (1976) (statements that "accurate[ly] descri[be] ... possible consequence[s] of lawful collective bargaining" are lawful); *Campbell Soup Co.,* 225

NLRB 222, 229 (1976) (finding no violation because there was no evidence employer would unilaterally reduce benefits upon union victory, but only that existing benefits might be altered through bargaining process); *Riley-Beaird, Inc.*, 271 NLRB 155, 155 (1984) (finding statement that "there are no guarantees that you would keep all your present pay and benefits" was protected speech).

The next statement is an equally truthful statement of the law. In its December 9 email, PG&E explained that:

> We have heard union supporters say that you have nothing to lose by organizing, because you will keep your current benefits until there is a new union contract- and then you will control the outcome by voting on the final Agreement. This assumes contract negotiations are complete before the general negotiations - - which are currently scheduled to start in September of next year - - and your terms and conditions are not decided by the entire ESC unit.

Report at 6; ESC's Br. at 12. Similar to the first statement, this statement is "merely a reflection of the bargaining process: negotiating carries with it no guarantee that the status quo will be preserved." *Riley-Beaird, Inc.*, 271 NLRB at 155. The Company was simply explaining that, given the *Armour-Globe* nature of the election, during the bargaining all of the terms and conditions of employment will be controlled by the new voting group unless the negotiations took more than 9 months and the initial negotiations merged into the successor negotiations.[2] In that case, the Company explained, just as with any other negotiation, the entire bargaining unit would make the decision on what would be the terms and conditions of employment for this group. There is absolutely nothing threatening about this clear and accurate statement of the law.

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[2] In its brief, the ESC unexplainably did not reproduce the critical phrase "and then you will control the outcome by voting on the final Agreement." Report at 6. By omitting this language, ESC gives the false impression that the Company suggested that the voting group would automatically be negatively impacted should bargaining continue until the general negotiations. When read in context, it is clear that PG&E was simply explaining that the group that votes on the contract will get much larger - - not that anything would happen automatically.

Finally, the third statement that ESC contends is threatening provides that "the Company ... has taken consistent positions *in current bargaining* with newly organized groups that certain parts of the existing agreement like Progressive Wage [i]ncreases are *subject to negotiation* and should not apply." ESC's Br. at 12 (emphasis added). ESC apparently construes this statement as a threat on the part of the Company to alter terms and conditions of employment *unilaterally. Id.*. However, ESC's interpretation of this sentence is at odds with its plain language, which unequivocally demonstrates the Company's commitment that any such changes will be made through "*negotiation*" between the parties during the collective bargaining process. In no way does it suggest any form of unilateral action.

The fact that the ESC disagrees that the Company has the right to propose modifications to the applicability of Progressive Wage increases (automatic wage increases contained in the main ESC-PG&E contract for employees every year until they reach the top of the agreed upon salary scale) for a newly represented group in an *Armour-Globe* election does not mean that this truthful statement somehow interfered with the election. First, again, all PG&E did was explain that it would be making *proposals* in negotiations. It never said it would impose any change of any kind on a unilateral basis. Further, the Company has every right to make proposals on wages, job descriptions, and other issues relating to how a new group will be integrated into the broader bargaining unit. As the Board explained in *Wells Fargo Armored Services Corp.*, 300 NLRB 1104 (1990), in finding an employer was obligated to bargain but was not required to impose any particular contract on the newly represented group:

> We do not agree that the "Globed" employees come automatically under the terms of the collective-bargaining agreement negotiated by the parties covering the driver and messenger guards. To do so would be contrary to *H. K. Porter Co. v. NLRB*, in which the Supreme Court held that the Board may require the parties to bargain, but it may not compel them to agree to any particular collective-bargaining provisions.

> Contrary to the judge, we find that the appropriate remedy is that the parties bargain over the terms and conditions of employment of the newly represented employees.

Id. at 1104. The only thing that it cannot do is insist on a "totally separate agreement so designed to effectively destroy the basic oneness of the unit." *Federal-Mogul Corp.*, 209 NLRB 343, 344 (1974). Informing employees that it will make a single proposal relating to a single aspect of compensation simply does not rise to the level of threatening to bargain in bad faith that could possibly justify overturning an election.

Notably, ESC provides no authority to even suggest that this or any similar statement is anything other than lawful employer speech. The cases cited by ESC, *Golden Eagle Spotting Co.*, 319 NLRB 64 (1995), and *Pearson Educ. Inc.*, 336 NLRB 979 (2001), are entirely beside the point and readily distinguishable. In stark contrast to *Golden Eagle*, where the employer informed employees that it would not bargain in good faith with the union and made unilateral changes to terms and conditions of employment, 319 NLRB at 75, 81, the December 9 email makes explicit that the Company will bargain with the Union in "good faith," and reaffirms in several places that any changes in conditions of employment must be a product of the "give-and-take" collective bargaining process. *See, e.g.,* Report at 5 ("[T]here must be a collective bargaining negotiation which addresses the terms and conditions on how the group is added into the larger ESC agreement."); *id.* ("Collective bargaining is a give-and-take process."); *id.* ("[T]he company and Union are obligated to bargain in 'good faith', but are not obligated to accept a particular proposal[.]").

In *Pearson*, the Board found that the employer engaged in objectionable conduct by threatening employees that negotiations would "start at zero" if they elected the union. 336 NLRB at 980. The Board found it significant that "the [employer] did not dispel the effect of its

threat through additional communications, such as an explanation that 'any reduction in wages or benefits will occur only as a result of the normal give and take of collective bargaining.'" *Id.* (internal citation omitted). In contrast to *Pearson*, neither the statement concerning Progressive Wage increases nor any other portion of the email could reasonably be construed as a threat to overhaul the employees' conditions of employment in their entirety and require the employees to start back at square one. Despite the repeated references in ESC's brief to the "start from 'zero'" bargaining at issue in *Pearson*, no such language can be found anywhere in the email. Further, as detailed above, unlike the statements at issue in *Pearson*, PG&E's email reiterated several times that any reduction in wages or benefits would come about *only* through collective bargaining negotiations. *See* Report at 4. Therefore, no employee could reasonably construe the December 9 email as a threat that the Company would unilaterally reduce wages or benefits, without going through the collective bargaining process, if the Union won the election, since such an interpretation is directly contradicted by the plain language of the email.

In sum, "a reasonable reading of the e-mail begets an understanding that any changes to the status quo would require the 'give-and-take' of bargaining." Report at 13. Any other interpretation of this email would be at odds with its plain language, which "emphasize[s] repeatedly that any reduction in wages and benefits could only be undertaken through *collective bargaining* with the Union." *Int'l Paper Co.*, 273 NLRB at 616 (emphasis added). Therefore, the Board should affirm the Regional Director's decision to overrule Objection 12 without a hearing.

IV. THE REGIONAL DIRECTOR PROPERLY OVERRULED ESC'S THIRTEENTH OBJECTION SINCE ESC FAILED TO COME FORWARD WITH ANY EVIDENCE THAT PG&E OR ONE OF ITS AGENTS DISSEMINATED MS. BECERRA'S COMPLAINT.

In Objection 13, ESC alleges that PG&E disseminated the complaint of a bargaining unit employee, Angela Becerra, regarding alleged promises of a benefit by a fellow employee, Kristen Dean, and that such dissemination caused employees to harass her and created an atmosphere of fear and coercion interfering with the laboratory conditions necessary for the conduct of a fair election. The Regional Director correctly overruled this Objection as ESC did not present any evidence to substantiate its bald assertion that PG&E disseminated Ms. Becerra's complaint.

To be entitled to an evidentiary hearing, a party must present sufficient evidence to "raise substantial and material factual issues," that if resolved in the party's favor, would "constitute grounds for setting aside the election[.]" 29 C.F.R. § 102.69(c)(1)(i); *see also N.L.R.B. v. J-Wood/A Tappan Div.*, 720 F.2d 309, 313 (3d Cir. 1983) ("[A]n evidentiary hearing is required if-and only if-the objecting party ma[kes] an adequate proffer of evidence to establish the existence of 'substantial and material factual issues.'"). This evidentiary burden "rests with the party urging that an election be set aside [and] [t]hat burden … is a heavy one." *N.L.R.B. v. S. Prawer & Co.*, 584 F.2d 1099, 1101 (1st Cir. 1978); *see also N.L.R.B. v. Basic Wire Products, Inc.*, 516 F.2d 261, 263 (6th Cir. 1975) (stating that party seeking to overturn election "'must shoulder a heavy burden of proof to demonstrate by specific evidence that the election was unfair.'") (quoting *Harlan # 4 Coal Co. v. NLRB*, 490 F.2d 117, 120 (6th Cir.)).

It is axiomatic that a party's bare, conclusory allegations alone are insufficient to demonstrate entitlement to a hearing. "'In order to obtain an evidentiary hearing, the objector's proffer of evidence must prima facie warrant setting aside the election. *The proffer may not be conclusory or vague*[.]'" *J-Wood/A Tappan Div.*, 720 F.2d at 313 (quoting *Anchor Inns, Inc. v. NLRB,* 644 F.2d 292, 296 (3d Cir.1981)) (emphasis added); *see also S. Prawer & Co.*, 584 F.2d

at 1102-03 ("The offer of proof necessary to require a hearing must be based on more than a mere difference of opinion with the Regional Director's inferences and conclusions. It must point to specific evidence which will be presented to controvert those findings.") "Speculation" and "conjecture" do not rise to the level of evidence sufficient to justify the grant of a hearing. *S. Prawer & Co.*, 584 F.2d at 1103.

Thus, where a party fails to come forward with competent proof in support of its allegations that its opponent interfered with the conduct of the election, the party's request for a hearing should be denied. *See, e.g., id.* (finding that Board did not abuse its discretion in refusing to grant hearing based on employee's statement that he "felt" that rumor concerning employer's potential relocation affected vote, since no evidence was presented to substantiate claim that employees changed their votes because of rumor); *Basic Wire*, 516 F.2d at 264 (holding that Board did not abuse its discretion in failing to hold evidentiary hearing based on party's "generalized claim that the election was unfair" and conclusory assertions in affidavit that election was affected by improper conduct).

The Board should not order an evidentiary hearing on the basis of ESC's unsupported "conjecture" and "speculation." *S. Prawer & Co.*, 584 F.2d at 1103. Simply put, one is not entitled to an evidentiary hearing absent the proffering of actual evidence. [3] *Id.* at 1102-03; *J-Wood/A Tappan Div.*, 720 F.2d at 313.

ESC's argument that the Regional Director mistakenly analyzed PG&E's alleged dissemination of Ms. Becerra's complaint under the third-party conduct standards is a red herring. In fact, it would have been error for the Regional Director to apply any other standard

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[3] The Regional Director further noted that even if ESC had come forward with evidence that PG&E or one of its agents had leaked Ms. Becerra's complaint to her co-workers, which it did not, he was not aware of any legal authority finding that an employer's disclosure of an employee's complaint constitutes objectionable conduct sufficient to set aside an election. Report at 14 n.13.

under the circumstances in light of the utter lack of evidence to support ESC's bare assertion that PG&E was somehow involved in the disclosure of Ms. Becerra's complaint. Correctly applying those standards, the Regional Director appropriately concluded that "one employee's shared opinion of what constitutes a 'bribe,' by itself, would not reasonably tend to 'create a general atmosphere of fear and reprisal rendering a free election impossible[,]'" nor would it "'so substantially impair the employees' exercise of free choice as to require that the election be set aside.'" Report at 14-15 (quoting *Westwood Horizons Hotel*, 270 NLRB 802 (1984); *Independence Residences, Inc.*, 355 NLRB 724 (2010)).

In sum, "[b]ecause [ESC] failed to produce substantive evidence to support its overall claim, no hearing was required." *Basic Wire Products, Inc.*, 516 F.2d at 266. ESC has not pointed to any evidence, let alone the "specific evidence" which is required "to challenge the Regional Director's finding" that the leaking of the complaint was not attributable to PG&E or its managers or agents. *S. Prawer & Co.*, 584 F.2d at 1102. Since ESC has failed to produce any evidence that even suggests that PG&E had anything to do with the dissemination of Ms. Becerra's complaint, there is no reason to schedule this matter for a hearing concerning Objection 13.

CONCLUSION

For the aforementioned reasons, PG&E respectfully submits that the Board should accept the Regional Director's recommendations, and accordingly, should affirm the overruling of Objections 2, 3, 12, and 13.

Dated:

Respectfully submitted,

By: _____

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ENGINEERS AND SCIENTISTS OF CALIFORNIA, LOCAL 20, IFPTE, AFL-CIO & CLC **Petitioner,** **and** **PACIFIC GAS & ELECTRIC CO.** **Respondent**	CASE NO. 20-RC-140248

CERTIFICATION OF SERVICE

I, **MICHAEL J. LEBOWICH**, of full age, do hereby certify as follows:

I am a partner with the law firm of Proskauer Rose LLP, attorneys for Respondent Pacific Gas & Electric Co. ("PG&E"), in the above-captioned action. I hereby certify that on June 1, 2015, I caused a true and correct copy of PG&E's Brief in Support of its Opposition to Petitioner's Exceptions to the Report and Recommendations on Objections and Notice of Hearing to be served on counsel for Petitioner, Danielle A. Lucido, by electronic mail at dlucido@ifpte20.org. Additionally, on June 1, 2015, I caused the same to be electronically filed with the National Labor Relations Board.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are false, I am subject to punishment.

Dated: Michael J. Lebowich, Esq.